

Americans with Disabilities Act: The Rise in ADA Non-Compliance Claims – How to Be Prepared

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ADA Basics

- **ADA Timeline**
 - Construction or Alterations which began after July 26, 1992 must apply 1991 ADA Standards.
 - Construction or Alterations which began after March 15, 2012 must apply 2010 ADA Standards.
- **Title II** of the ADA applies to state and local government facilities
- **Title III** applies to Public Accommodations and Commercial Facilities
- Rise in “drive-by” ADA cases, but we continue to see cases by pro se and represented plaintiffs making specific complaints about accessibility issues in their community and at facilities they frequently visit, etc.
- Government especially susceptible to the second type of accessibility issues, as facilities may have specific functions which cannot be accessed at another location, etc., and state and local governments are held to a higher standard for rectifying accessibility issues.

Anatomy and Options in an ADA Access/Compliance Case,

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- Plaintiff visits facility, and determines that certain items are not in compliance with the ADA;
- Plaintiff files complaint in federal court alleging violations of the ADA;
- Attorney must answer complaint, inspect facility, and determine what violations exist, whether any defenses exist, and if and when repairs may be completed.
- Plaintiff may request an inspection by their expert, which requires presence of your attorney; potentially driving up costs paid by Defendant;
- Defendant must pay to address repairs, if necessary;
- If repairs are completed quickly, Defendant may file a motion requesting dismissal of claims, as moot. Utah District Court judges have found that Plaintiff is not prevailing party if case is moot, with no fees or costs awarded.

Anatomy and Options in an ADA Access/Compliance Case, continued.

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- If repairs are needed, but cannot be completed during discovery, or to avoid the expense of a motion to dismiss, settlement may be an option. If significant violations, prevailing Plaintiff may be entitled to attorney's fees and costs, which drives up the cost of a potential settlement;
- Potential for dispositive motion by Plaintiff, raising Defendant's attorney's fees, both to respond to motion, and if court orders Defendant to pay Plaintiff's fees and costs;
- These types of cases are rising, but proper preparation, can potentially reduce liability and attorney's fees;
- By demonstrating previous action to increase accessibility, and documented analysis of costs within exceptions allowed by the CFRs, the likelihood of success on a motion, or a reduced settlement amount, is increased, as we can show that any violations fall into an established exception.
- Chances of exceptions go down each year, due to new construction, alterations, remodeling and repairs.

State and Local Government

- **28 CFR 35.151 – New Construction and Alterations**
 - Title II facilities have different requirements than Title III facilities.
- **2004 ADAAG at 36 CFR 1191, appendices B and D**
 - These are the actual “standards; “ scoping and technical requirements are the same for both Title II and Title III, unless otherwise noted.
- **28 CFR 35.150 – Existing Facilities**
 - Title II facilities have a higher standard for accessibility than the “readily achievable” standard for removal of barriers for Title III facilities.

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28 CFR 35:150 Existing Facilities

- Generally - A public entity shall operate each service, program, or activity so that the service, program, or activity, **when viewed in its entirety**, is readily accessible to and usable by individuals with disabilities. However, this DOES NOT:
 - Necessarily require that a public entity make **each** of its existing facilities accessible to and usable by individuals with disabilities;
 - Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or
 - Require a public entity to take any action that it can demonstrate would result in **a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.**
 - If an action would result in such an alteration or burdens, a public entity shall take **any other action** that would not result in such an alteration or such burdens but would ensure that individuals with disabilities receive the benefits or services provided.

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Safe Harbor

- Safe Harbor – Elements which have not been altered after March 15, 2012 and which were previously in compliance with 1991 standards or UFAS, are not required to be modified.

- No Safe Harbor for elements not addressed in 1991 but are present in 2010 Standards. Includes fishing piers and platforms, golf and miniature golf facilities, swimming pools, etc.

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Methods for Accessibility

- Some options for complying: redesign or acquisition of equipment, **reassignment of services to accessible buildings**, delivery of services at **alternate accessible sites**, alteration of existing facilities and construction of new facilities, or any other methods to make its services, programs, or activities readily accessible.
- A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance.
- A public entity shall give **priority** to those methods that offer services, programs, and activities to qualified individuals with disabilities **in the most integrated setting appropriate**.
- Guidance suggests that the requirement to remove barriers for governmental agencies is higher than the “readily achievable” standard used in Title III for commercial facilities.

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28 CFR 35:151

New Construction and Alterations

- Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that it is readily accessible to and usable by individuals with disabilities,
- **New Construction and Alterations.**
 - If started after July 26, 1992, but before September 15, 2010, can comply with either 1991 ADA Standards, or UFAS (Uniform Federal Accessibility Standards), except the elevator exemption in section 4.1.3(5) and 4.1.6(1)(k) of the 1991 standards, shall not apply (stating no elevator required in facilities of less than 3 stories or 3,000 sf/story).
 - If started between Sep. 15, 2010 and March 15, 2012, may comply with 2010 ADA Standards, 1991 ADA Standards, or UFAS, (again, elevator exemption does not apply).
 - If started on or after March 15, 2012, 2010 ADA Standards shall apply.
- **Noncomplying new construction and alterations.**
 - Facilities or elements constructed before March 15, 2012, not in compliance with the 1991 Standards or UFAS, must be made accessible to the 2010 ADA Standards.

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Exception for Structural Impracticability

- **Structural Impracticability:** Full compliance with this section is not required where a public entity can demonstrate that it is **structurally impracticable to meet the requirements**. Full compliance will be considered structurally impracticable only in those rare circumstances **when the unique characteristics of terrain prevent the incorporation of accessibility features**.
 - If full compliance is impracticable, all compliance which is not structurally impracticable should be completed, and **all areas which can be made accessible, should be**.
 - Even if access for a person with a certain disability, for example, in a wheelchair, is impracticable, **accessibility should still be ensured for individuals with other types of disabilities**.

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Exception for Alterations

- Alterations should be conducted, **to the maximum extent feasible**, to ensure the altered portion of the facility is accessible.
- Alterations should be made so that the path of travel to an area of a facility that contains a primary function, including the restrooms, phones, and drinking fountains serving that area, is accessible, unless the cost or scope of the such an alteration is disproportionate (>20%) to the cost of the overall alteration.
- When the cost of alterations to make the path of travel accessible is disproportionate to the cost of the overall alteration, **the path of travel shall be made accessible to the extent that it can be made accessible without incurring disproportionate costs.**

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Alterations, Cont.

- In choosing which accessible elements to provide, priority should be given to those elements that will provide the greatest access, in the following order—
 - (1) An accessible entrance;
 - (2) An accessible route to the altered area;
 - (3) At least one accessible restroom for each sex or a single unisex restroom;
 - (4) Accessible telephones;
 - (5) Accessible drinking fountains; and
 - (6) When possible, additional accessible elements such as parking, storage, and alarms.

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2004 ADAAG at 36 CFR 1191 Accessibility Guidelines

- **36 CFR 1191, appendices B and D**, set out the guidelines for buildings and facilities, which serve as the basis for the accessibility standards adopted by the DOJ and DOT.
- **Appendix B**: Chapter 1 – Application and Administration; Chapter 2 – Scoping Requirements
- **Appendix D**: Technical requirements, Chapters 3-10

DOJ's 2010 ADA Standards for Accessible Design, and Guidance on the 2010 ADA Standards for Accessible Design can be accessed at:

https://www.ada.gov/2010ADAstandards_index.htm

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Appendix B

- Chapter 1 – Application and Administration
 - How to apply standards in Appendix B and D; definitions and other explanations, charts, measuring, etc.
- Chapter 2 – Scoping Requirements
 - Exceptions to general standards for construction sites, detention and correctional facilities, residential facilities, employee work areas, etc.
 - When certain areas and equipment are required:
 - **Accessible Routes and Means of Egress** – §§ 206-07
 - **Parking Spaces** §208; Stairways §210
 - Drinking Fountains, Kitchens, sinks §§211-212
 - **Toilet**, Bathing, dressing/locker rooms §§213, 222
 - Fire Alarms §215; **Signs** §216; Assembly areas §221
 - **Dining and Work Surfaces** §226
 - Many other sections which include: public transportation, telephones, fire alarms, ATMs, medical care, storage, sales and service, windows, vending/change machines, mail boxes, residential facilities, recreational boating facilities, exercise equipment, fishing piers, golf facilities, play areas, swimming pools, shooting facilities, etc.

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Appendix D

Chapters 3 - 6

These chapters provide specific requirements for equipment and areas.

- Chapter 3 – **Building Blocks**. This chapter includes: floor and ground surfaces; **changes in level** (bumps); turning space; clear floor space; **knee and toe clearance**; protruding objects; **reach ranges**.
- Chapter 4 – **Accessible Routes**. This chapter includes: **walking surfaces (slope)**; **doors, doorways, gates**; **Ramps**; **curb ramps**; elevators and platform lifts.
- Chapter 5 – **General Site and Building Elements**. This chapter includes: **parking spaces**; passenger loading zones; stairways; **handrails**.
- Chapter 6 – **Plumbing Elements and Facilities**. This chapter includes: drinking fountains; **toilet and bathing rooms**; **water closets and toilet compartments**; **urinals**; **lavatories and sinks**; bathtubs; shower compartments; **grab bars**; seats; washing machines and dryers; saunas and steam rooms.

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Appendix D

Chapters 7-10

- Chapter 7 – **Communication Elements and features**. This chapter includes: fire alarm; **signs**; telephones; detectable warnings (for platform edges, etc.); assistive listening systems; ATM and fare machines; two-way communication systems.
- Chapter 8 – **Special Rooms, Spaces, and Elements**. This chapter includes: wheelchair spaces, companion seats, designated aisle seats; dressing, fitting, and locker rooms; kitchens and kitchenettes; medical care and long-term care facilities; transient lodging guest rooms; holding cells and housing cells; courtrooms; residential dwelling units; transportation facilities; storage.
- Chapter 9 – **Built-In Elements**. This chapter includes: **dining and work surfaces**; benches; checkout aisles and **sales and service counters**.
- Chapter 10 – **Recreational Facilities**. This chapter includes: amusement rides; recreational boating facilities; exercise machine and equipment; fishing piers and platforms; golf and miniature golf facilities; play areas; swimming and wading pools, spas; shooting facilities with firing positions.

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Common Items in Complaints

- Complaints seem to focus on those items which are higher on the ADA prioritization list:
 - Accessibility to the facility: parking lot spaces, parking lot slope, ramps, doorways, etc.
 - Accessibility to the primary function of the facility: seats, counters, cashier, etc.
 - Accessibility to restrooms, water closets, items within the restroom.
- Many complaints focus on issues which would be simple to address, such as missing van-accessible signs, soap/paper towel dispensers or mirrors hung incorrectly, etc.

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Questions and Defenses for Alleged Violations

- Structural Impracticability: if changing a doorway to be wide enough is not feasible, based on the structure, etc.
 - Is there another route/doorway which can be widened?
 - Have all the non-impractical accessibility options been provided?
- Cost of alteration is disproportionate to the cost of altering path of travel to make accessible.
 - Have all other possible accessibility options been implemented in the alteration?
 - Has the cost and corresponding analysis been discussed and recorded?
 - Has the list of priority items been followed in determining which accessibility options can be implemented for <20% of the total alteration cost?
- Are there facilities or options to move the primary purpose to another facility, an alternate accessible location etc.?

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How Can You Prepare?

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- Educate maintenance and other staff to identify simple violations and cost-effective options to address issues:
 - Sufficient parking spaces, correctly painted, with signs posted for van-accessible access;
 - Dispensers, mirrors, etc., hung the appropriate distance from the floor/toilet or within the reach range, etc.;
 - Identify those repairs and alterations which can be addressed with planning, and implement that plan.
- Ensure that proper analysis of alterations, existing facilities which lack accessible features, etc., has been conducted:
 - Determine cost to address accessibility issues, including partial steps to improve accessibility, prioritize the more expensive repairs (per the CFRs), and determine a timeline to address each one.
- Implement an accessibility component to the process for changes to facilities, movement of programs, etc.;
- Document all repairs, planning, and analysis.

Final Thoughts / Questions?

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- Evaluate potential pitfalls and pressure points in your community, such as:
 - Play areas have accessibility requirements, may be potential for a parent to bring a case, etc.;
 - Ensure accessibility to vital services;
 - Complaints about accessibility made directly to entity or facility, prior to taking legal actions:
 - Clarify or implement a complaint procedure, for residents and/or employees, to ensure that complaints about accessibility have been rectified or responded to.